U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 15-0077 BLA
and 15-0120 BLA

RUTH LEE (o/b/o and Widow of JIMMY LEE) Claimant-Respondent v. A&M COAL COMPANY, INCORPORATED and KENTUCKY EMPLOYERS MUTUAL INSURANCE Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/17/2016 DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Frank K. Newman (Cole, Cole, Anderson & Newman PSC), Barbourville, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton, PLLC), Pikeville, Kentucky, for employer/carrier.

MacKenzie Fillow (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2011-BLA-6253 and 2011-BLA-6361) of Administrative Law Judge Joseph E. Kane awarding benefits on a miner's claim[1] and a survivor's claim[2] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act).[3] The administrative law judge found that the miner had thirty-five years in underground coal mine employment, based on the parties' stipulation, and adjudicated these claims pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge also found that the evidence established that the miner had a totally disabling pulmonary or respiratory impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge therefore found that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4). Further, the administrative law judge found that employer failed to establish rebuttal of

[1] The miner filed his claim on August 18, 2009. Director's Exhibit 2. He died on January 3, 2010, while his claim was pending before the administrative law judge. Claimant, who is the widow of the miner, is pursuing the miner's claim on behalf of his estate. Director's Exhibit 48.

[2] Claimant filed her survivor's claim on February 10, 2010. Director's Exhibit 43. It was consolidated with the miner's claim.

[3] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption of total disability due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment are established. 30 U.S.C. §921(c)(4). The amendments also revived Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*).

the presumption. Accordingly, the administrative law judge awarded benefits in the miner's claim. With regard to the survivor's claim, the administrative law judge found that, because the miner was entitled to benefits at the time of his death, claimant was automatically entitled to survivor's benefits under Section 422(*l*), 30 U.S.C. §932(*l*).

On appeal, employer challenges the administrative law judge's finding that it failed to establish rebuttal of the Section 411(c)(4) presumption by disproving that the miner had clinical and legal pneumoconiosis. Employer also contends that the administrative law judge erred by failing to consider whether it proved that pneumoconiosis played no part in the miner's totally disabling respiratory impairment. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to affirm the administrative law judge's rebuttal findings.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of both clinical and legal pneumoconiosis,[6] or by

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had thirty-five years in underground coal mine employment, that the evidence established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), and that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mine industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

[6] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

proving that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer first contends that the administrative law judge erred in finding that it failed to disprove that the miner had clinical pneumoconiosis. Specifically, employer argues that the administrative law judge violated the Administrative Procedure Act (APA)[7] by failing to adequately explain why he found the x-ray evidence to be inconclusive. In reaching his conclusion, the administrative law judge considered the readings of an x-ray dated September 26, 2009, and the readings of x-rays contained in the miner's medical treatment records. The administrative law judge permissibly found that the September 26, 2009 x-ray was negative for pneumoconiosis, based on the negative readings by two physicians who are dually qualified as B readers and Board-certified radiologists.[8] *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). In addition, the administrative law judge permissibly found that the April 7, 2009 x-ray was positive for pneumoconiosis, based on the positive readings by two qualified physicians.[9] *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). Further, the administrative law judge reasonably found that the other x-rays taken in 2009 "should not be interpreted as negative for

[7] The Administrative Procedure Act, as incorporated into the Act by 30 U.S.C. §932(a), provides that adjudicatory decisions must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A).

[8] Dr. Baker, a B reader, read the September 26, 2009 x-ray as positive for pneumoconiosis, Director's Exhibit 12, while Drs. Wiot and Wheeler, dually qualified as B readers and Board-certified radiologists, read this x-ray as negative, Director's Exhibit 15; Employer's Exhibit 3.

[9] The administrative law judge noted that, "[a]lthough the record does not contain the interpreting physicians' qualifications, a corresponding [June 3, 2009] letter from Dr. David N. Weissman, [who is the Director of the Division of Respiratory Disease Studies at the National Institute for Occupational Safety and Health], stated that each chest x-ray was evaluated by either an A reader or B reader." Decision and Order at 17; *see* Director's Exhibit 61 at 12-14.

pneumoconiosis" because they all show abnormalities.[10] Decision and Order at 17; *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Thus, we reject employer's assertion that the administrative law judge violated the APA in finding the x-ray evidence to be inconclusive regarding the presence or absence of pneumoconiosis. *See generally Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994).

Employer also asserts that the administrative law judge erred in "fail[ing] to explain how the biopsy findings of pigmentation equate to a diagnosis of pneumoconiosis, or how the CT scan evidence establishes [the miner] 'had both cancer and clinical pneumoconiosis.'" Employer's Brief at 9, *citing* Decision and Order at 18. In finding that the miner had both lung cancer and clinical pneumoconiosis, the administrative law judge considered the CT scan and biopsy evidence contained in hospital and treatment records. The administrative law judge noted that the May 21, 2009 CT scan showed a left hilar mass measuring 1.7 centimeters in greatest diameter and chronic post-obstructive atelectasis/infiltrates in the left lower lobe, that the July 8, 2009 CT scan showed a lesion in the left lower lobe measuring approximately 4.8 x 4.0 centimeters, and that the July 29, 2009 CT scan showed a mass in the left lower lobe measuring 5.7 x 5.4 centimeters. The administrative law judge also noted that, "[o]n July 15, 2009, the [m]iner's left upper lobe CT-guided biopsy … show[ed] prominent pigmentation consistent with anthracosis' and 'moderately differentiated adenocarcinoma, focally showing a mucinous-type cytoplasm.'" Decision and Order at 18; *see* Director's Exhibits 57 at 53-56, 59 at 10-14. In addition, the administrative law judge noted that the regulatory definition of clinical pneumoconiosis includes anthracosis arising out of coal mine employment. 20 C.F.R. §718.201(a)(1). Thus, the administrative law judge reasonably determined that "the CT scans, when considered in conjunction with the [m]iner's biopsy results, support [his] conclusion that the [e]mployer has failed to rebut the presumption that the [m]iner had clinical pneumoconiosis based on the radiological evidence." Decision and Order at 18; *see Kuchwara*, 7 BLR at 1-170. Consequently, we reject employer's assertion that the administrative law judge erred in failing to explain why he found that employer failed to

[10] The administrative law judge noted that "[r]ecent x-rays taken in 2009 showed abnormalities, such as lung infiltrates, emphysematous changes bilaterally, chronic post-obstructive atelectasis, a tiny left pneumothorax, development of a 'small infiltrate, posterior segment, left lower lobe and small right sided effusion,' 'COPD with acute congestive failure and/or active interstitial infiltrate.'" Decision and Order at 17, *citing* Director's Exhibits 11, 56, 57.

establish the absence of clinical pneumoconiosis based on the CT scan and biopsy evidence.[11]

Because the administrative law judge's evaluation of the x-ray, CT scan, biopsy, and medical opinion evidence is supported by substantial evidence, we affirm his finding that employer failed to disprove the existence of clinical pneumoconiosis.[12]

Employer further asserts that the administrative law judge erred in finding that it failed to disprove that the miner had legal pneumoconiosis. In evaluating this issue, the administrative law judge considered the opinions of Drs. Broudy and Vuskovich that the miner did not have legal pneumoconiosis.[13] The administrative law judge discounted Dr.

[11] The administrative law judge also considered the opinions of Drs. Broudy and Vuskovich with regard to the issue of clinical pneumoconiosis. Director's Exhibit 13; Employer's Exhibit 2. The administrative law judge noted that "Dr. Broudy stated '[h]aving not had an occasion to review the chest x-rays I cannot dispute Dr. Baker's findings [that the miner had coal workers' pneumoconiosis].'" Decision and Order at 18; *see* Director's Exhibit 13 at 4. Further, the administrative law judge rejected Dr. Vuskovich's opinion that the miner did not have clinical pneumoconiosis. Employer does not argue with specificity why the administrative law judge's consideration of Dr. Vuskovich's opinion on the issue of clinical pneumoconiosis was improper. *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120 (1987) (holding that unless the party identifies errors and briefs its allegations of error in terms of the relevant law and evidence, the Board has no basis for review). Thus, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the absence of clinical pneumoconiosis.

[12] We note that employer's failure to establish the absence of clinical pneumoconiosis precludes it from disproving the existence of pneumoconiosis, as employer must establish the absence of both clinical *and* legal pneumoconiosis to satisfy the first prong of rebuttal at 20 C.F.R. §718.305(d)(2)(i). However, employer's argument regarding the administrative law judge's weighing of the evidence on the issue of legal pneumoconiosis is relevant to the issue of disability causation under the second prong of rebuttal at 20 C.F.R. §718.305(d)(2)(ii). Consequently, we will address it.

[13] In a November 2, 2009 report, Dr. Broudy opined that the miner's chronic obstructive pulmonary disease (COPD) was "far more likely due to cigarette smoking than the inhalation of coal mine dust." Director's Exhibit 13. Further, Dr. Broudy disagreed with Dr. Baker's statement that claimant's COPD and resting arterial hypoxemia are due to coal dust exposure. *Id.* In an August 31, 2012 report, Dr. Vuskovich opined that the miner's disabling pulmonary impairment did not arise in whole or in part out of coal dust exposure. Employer's Exhibit 2.

Broudy's opinion because "Dr. Broudy did not explain how he eliminated the [m]iner's thirty-five years of coal dust exposure as a contributing factor to the [m]iner's [chronic obstructive pulmonary disease]."[14] Decision and Order at 19. Further, the administrative law judge found that Dr. Vuskovich's opinion was insufficient to establish the absence of legal pneumoconiosis. Hence, the administrative law judge found that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that "[s]ubstantial evidence does not support [the administrative law judge's] analysis of Dr. Vuskovich's opinion because the physician offered a well-reasoned explanation which excluded coal dust as a cause of [the miner's] disabling impairment." Employer's Brief at 11. In addressing Dr. Vuskovich's opinion on legal pneumoconiosis, the administrative law judge stated that "Dr. Vuskovich opined that the [m]iner's spirometry revealed a 'mild obstructive ventilatory impairment,' … [and that] 'it was not possible to tease out the portion of [the miner's] impairment caused by cigarette smoke or coal dust from the portion of his impairment caused by lung cancer compressing his large and small left lung bronchi.'" Decision and Order at 19; *see* Employer's Exhibit 2 at 14. The administrative law judge found that "Dr. Vuskovich acknowledged he could not rule out coal dust as a contributing factor to the [m]iner's pulmonary impairment." Decision and Order at 19.

Contrary to the administrative law judge's finding, however, under the first prong of rebuttal in a miner's claim at 20 C.F.R. §718.305(d)(1)(i)(A), an employer is not required to "rule out" coal dust exposure as a contributing cause of a miner's chronic lung disease or impairment in determining whether it disproved the existence of legal pneumoconiosis. Rather, the administrative law judge should have considered whether employer disproved the existence of legal pneumoconiosis by establishing that the miner did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp*., BLR , BRB No. 13-0544 BLA, slip op. at 6 n.8 (Apr. 21, 2015) (Boggs, J., concurring and dissenting). Because the administrative law judge applied an incorrect standard in finding that Dr. Vuskovich's opinion is insufficient to establish the absence of legal pneumoconiosis, we vacate the administrative law judge's finding that employer failed to

[14] No party challenges the administrative law judge's determination that Dr. Broudy did not explain how he eliminated coal dust exposure as a contributing factor to the miner's COPD. Thus, we affirm the administrative law judge's weighing of Dr. Broudy's opinion on the issue of legal pneumoconiosis under the first prong of rebuttal, as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

disprove the existence of legal pneumoconiosis, and remand the case for further consideration of the medical opinion evidence thereunder. 20 C.F.R. §718.305(d)(2)(i).[15]

Employer also asserts that the administrative law judge erred by failing to consider whether it proved that pneumoconiosis played no part in the miner's totally disabling respiratory impairment. Employer maintains that the administrative law judge instead improperly "considered whether [it] rebutted the 'presumption by showing that the [m]iner's death was not due to pneumoconiosis.'" Employer's Brief at 12, *citing* Decision and Order at 19. As employer argues, the administrative law judge erroneously rendered a finding that employer failed to rebut the presumption that the miner's death, rather than his totally disabling respiratory or pulmonary impairment, was due to pneumoconiosis in the miner's claim.[16] *Minich*, BLR , BRB No. 13-0544 BLA, slip op. at 10-11. We, therefore, vacate the administrative law judge's finding that employer failed to establish the second prong of rebuttal at 20 C.F.R. §718.305(d)(2)(ii), and remand the case for further consideration of the evidence thereunder. On remand, the administrative law judge must determine whether employer is able to rebut the presumed fact of disability causation with credible proof that no part of the miner's respiratory or pulmonary total disability was caused by either clinical or legal pneumoconiosis. *Id.*

Finally, in view of our decision to vacate the administrative law judge's finding that employer failed to establish the second prong of rebuttal and, thus, his finding that the miner was entitled to benefits at the time of his death, we also vacate the administrative law judge's finding that claimant is derivatively entitled to survivor's benefits at Section 422(*l*), 30 U.S.C. §932(*l*). If, on remand, the administrative law judge again awards benefits in the miner's claim, he should reinstate the award of survivor's benefits.

[15] In so holding, we recognize the argument of the Director, Office of Workers' Compensation Programs, that Dr. Vuskovich's statement leaves open the possibility that coal mine dust was a substantially contributing cause of [the miner's] COPD. That determination, however, is appropriately made in the first instance by the administrative law judge and not by this Board.

[16] The administrative law judge stated that employer could rebut the presumption "by showing that the [m]iner's death was not due to pneumoconiosis." Decision and Order at 20. Thereafter, the administrative law judge declined to credit Dr. Vuskovich's opinion on death causation and gave Dr. Broudy's opinion no probative weight because Dr. Broudy did not provide an opinion on the cause of the miner's death. *Id.* at 20-21.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge